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No. 269 Miscellaneous

# In the Supreme Court of the United States

OCTOBER TERM, 1948

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UNITED STATES OF AMERICA, PETITIONER

*v.*

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, AND FEDERAL ENGINEERING CORPORATION

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*ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

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BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the district court on respondents' motions to transfer the action to another district is reported in 80 F. Supp. 734. A copy of this opinion is set forth in the Appendix to the Government's

petition for certiorari (pp. 20-43) and a certified copy of the opinion has been filed with this Court. An opinion by the district court and an opinion by this Court, rendered at a prior stage of the present proceeding, are respectively reported in 7 F. R. D. 456 and 324 U. S. 573.

## JURISDICTION

The date of the order and judgment of the district court sought to be reviewed is October 28, 1948.

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28, United States Code (formerly Section 262 of the Judicial Code, 28 U. S. C. 377), as enacted by Public Law 773, 80th Cong., 2d Sess.

Section 2 of the Act of February 11, 1903, as amended (15 U. S. C. 29), confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the Sherman Act. Grant of the common law writ of certiorari, as authorized by Section 1651(a) of Title 28, United States Code, is sought in aid of such exclusive appellate jurisdiction.

The following decisions sustain the power and jurisdiction of this Court to review the order and judgment review of which is herewith sought:

*United States Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196;

*De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212.

## QUESTION PRESENTED

Whether Section 1404(a) of Title 28, United States Code, applies to proceedings under the antitrust laws governed by the venue provisions of Section 12 of the Clayton Act.

## STATUTES INVOLVED

Title 28, United States Code, Section 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.[1]

Title 28, United States Code, Section 1404(a), provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 12 of the Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

> That any suit, action, or proceeding under the antitrust laws against a corporation may

[1] The reviser's notes state that this section is expressive of the construction placed upon Section 262 of the Judicial Code (28 U. S. C. 377) by this Court in *U. S. Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212 (H. Rep. No. 308, 80th Cong., 1st Sess., p. A145).

be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

STATEMENT

On April 10, 1947, the United States filed a civil suit in the Southern District of California charging the respondents with violating Sections 1 and 2 of the Sherman Act.[2] Respondents' motions to dismiss the action upon the ground that the Southern District of California is not a convenient forum for the trial were sustained by the district court, and a judgment dismissing the complaint, without prejudice to institution of a similar proceeding against the same respondents in a more appropriate and convenient forum, was entered on October 15, 1947. On appeal to this Court, the judgment of dismissal was reversed. The Court held that Congress, when it enacted Section 12 of the Clayton Act in order to enlarge the venue of proceedings under the antitrust laws, intended to leave no room for "judicial discretion to apply the doctrine of *forum non conveniens* so as to deprive the plaintiff of the choice [of venue] given by the

[2] The present respondents include all of the respondents in *United States v. National City Lines*, 334 U. S. 573, except American City Lines, Inc. The judgment entered by the district court on October 28, 1948, dismissed the cause as to American City Lines, Inc. (see petition for writ of certiorari, note 5, p. 6).

section." *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 588.

After the district court had received the mandate of this Court, the various respondents on August 5, 1948, filed notices that they would move the court on September 20, 1948, pursuant to their respectively annexed motions, to transfer the action to the United States District Court for the Northern District of Illinois, Eastern Division. All of these motions were based upon Section 1404(a) of Title 28 of the United States Code and, in substance, are the same. The motion made by National City Lines, Inc., American City Lines, Inc., and Pacific City Lines, Inc., which is representative of all the others, is set forth in the Appendix to the Government's petition for writ of certiorari (Exhibit A, pp. 19-20). A certified copy of the motion has been filed with this Court.

On October 12, 1948, the district court filed an opinion holding that Section 1404(a) of Title 28 of the United States Code applies to the present action.[3] The grounds which the court gave for this conclusion were that the language of Section 1404(a) makes it applicable to all civil actions, including those under the antitrust laws, and that the legislative history of the section supports the view that it applies, without exception, to every civil action brought in a federal district court.

[3] This opinion is set forth in the Appendix to the petition for certiorari, Exhibit B, pp. 20-43.

The court also ruled that the facts of the particular case were such as to call for exercise of this power. Accordingly, judgment and order transferring the cause to the United States District Court for the Northern District of Illinois, Eastern Division, was entered on October 28, 1948.[4]

The Government on December 10, 1948, filed with this Court a motion for leave to file a petition for writ of certiorari pursuant to Section 1651(a) of Title 28, United States Code. By an order entered by this Court on December 20, 1948, the case has been assigned for hearing on the motion for leave to file petition for writ of certiorari.

## SUMMARY OF ARGUMENT

I

The common law writs which this Court is authorized to issue in aid of its appellate jurisdiction have traditionally been used to confine an inferior federal court to its lawful jurisdiction or to compel it to exercise its authority when it is its duty to do so. The present case comes squarely within such traditional use since the writ is sought to compel the district court to adjudicate the action pend-

[4] The judgment and order of transfer appear in the Appendix to the petition for certiorari (Exhibit C, pp. 44). By subsequent orders of the district court, execution of the order of transfer has been stayed until 20 days after this Court shall have taken final action on the Government's motion for leave to file petition for writ of certiorari now pending in this Court (see Government's petition for writ of certiorari, pp. 8-9).

ing before it, in conformity with the requirements of the statute alleged to be controlling. A further reason for granting the writ is that there is no other available remedy for the correction of the injury caused the petitioner by the judgment which it challenges. And the petition for certiorari presents a question which is of substantial public importance, namely, a question as to the authority of district courts which affects every civil proceeding under the antitrust laws against a corporation. Until this question is settled by this Court, it will constantly plague courts and litigants.

II

By Section 12 of the Clayton Act, Congress provided special venues for civil suits under the antitrust laws and granted to the plaintiff in such a suit the right to trial in the venue of his choice. The compilers of the United States Code did not include these venue provisions in Title 28 of the Code.

The purpose of Public Law 773, 80th Cong., 2d Sess., was to codify, rearrange, and clarify Title 28, and to eliminate obsolete material. The Committee reports on the bill, its Congressional sponsors, and its draftsmen gave repeated assurances that they had scrupulously avoided making any controversial change in existing law. No statement or suggestion was ever made, so far as we have found, that the bill would repeal any right as

to place of trial conferred by Section 12 of the Clayton Act.

Public Law 773 codified the numerous venue provisions previously included in Title 28 of the United States Code. Several of these provisions were drawn from special venue statutes and serious doubt had long existed as to whether special venue statutes permit any application of the doctrine of *forum non conveniens*.

Section 1404(a) of Public Law 773 provides that a district court may, for the convenience of witnesses and parties, transfer "any civil action" to another district where it might have been brought. The section serves two useful purposes. First, it establishes that the doctrine of *forum non conveniens* applies to any civil action as to which the applicable venue provisions are codified by Public Law 773, whether or not these venue provisions are derived from a special venue statute. Second, the section implements the *forum non conveniens* doctrine by providing authority to transfer the action to another district, whereas previously when a case was found to come within the doctrine the only available remedy was the less efficient and more drastic one of outright dismissal of the action.

The foregoing construction of Section 1404(a) gives to the words "any civil action" full application within the field as to which Congress was legislating—the actions and remedies codified in the revised Title 28. The construction is also sup-

ported by the principle that repeals by implication are not favored and by the principle that provisions of a statute which is of general application leave unimpaired prior legislation directed specifically to a given subject unless the later statute expressly indicates otherwise.

## ARGUMENT

The sole question which the Government raises here is whether Section 1404(a) of Title 28, United States Code, applies to proceedings under the antitrust laws which are governed by the venue provisions of Section 12 of the Clayton Act. If, as we urge, Section 1404(a) does not apply to such a proceeding, the district court had no authority to transfer this case to another district. We do not raise the question whether the district court improperly exercised its authority, if it should be held, contrary to our contention, that Section 1404(a) applies to the present proceeding.

### I

**The Case Is an Appropriate One for Exercise by This Court of Its Discretionary Power to Issue Certiorari under the "All Writs" Section of the Judicial Code**

There can be no doubt as to the power and jurisdiction of this Court to issue the writ which is here sought. The common law writs in aid of appellate jurisdiction (presently authorized by Section 1651(a) of Title 28, United States Code) have been frequently granted to review interlocutory orders

or judgments.[5] The question is, therefore, not as to the power of the Court to grant the writ, but whether, considering all the circumstances, this is an appropriate case for exercise of the power. See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26.

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* case, *supra*, p. 26. The present case falls squarely within this definition of the function of the writ. The basis of the Government's motion here is that the district court has declined to retain jurisdiction of and to adjudicate the cause, in contravention of its statutory duty to do so. See *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 582, 588-589. This Court has in numerous like cases issued one of the common law writs (formerly authorized by Section 262 of the Judicial Code) to review the alleged failure of an inferior court to exercise powers of adjudication imposed upon it by law.[6]

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[5] *Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Ex parte United States*, 287 U. S. 241; *McCullough* v. *Cosgrave*, 309 U. S. 634; *Ex parte Kawato*, 317 U. S. 69; *Ex parte Peru*, 318 U. S. 578; *United States Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212.

[6] Examples of action of this kind which have been reviewed by such writ are: Transfer of a cause of action to the equity side of the court (*Ex parte Simons*, 247 U. S. 231); appoint-

The common law writs which the Court is authorized to issue in aid of its appellate jurisdiction may not properly be employed as mere substitutes for appeal. *Ex parte Fahey*, 332 U. S. 258, 260. Accordingly, an important, although not necessarily controlling, consideration bearing upon allowance of the writ is whether "other adequate remedy is available" for correction of the alleged error of the inferior court. *Ex parte Peru*, 318 U. S. 578, 584; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212, 217.

In the present case an appeal, following entry of final judgment, would not be an adequate remedy for the injury caused by erroneous transfer of the action from the district of the plaintiff's choice.[7]

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ment of an auditor to take evidence and make a report on factual issues prior to jury trial (*Ex parte Peterson*, 253 U. S. 300, 305-306); referring a patent infringement suit to a master for trial (*McCullough* v. *Cosgrave*, 309 U. S. 634; *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701); abating, for the duration of the war, a suit brought by a resident alien enemy (*Ex parte Kawato*, 317 U. S. 69).

[7] Respects in which the plaintiff may be injured by the transfer include delay in obtaining trial in the district of transfer, disruption of the work of the Government's legal staff in the district of original suit, and additional expense of trial. (See Gov. brief (p. 26) in *National City Lines* case, 334 U. S. 573).

The history of the criminal antitrust proceeding instituted in the court below against the National City Lines defendants serves to document the foregoing elements of injury. On August 14, 1947, the court ruled that the case should be transferred to the Northern District of Illinois, Eastern Division. *United States* v. *National City Lines, Inc.*, 7 F. R. D. 393. The case has not yet been tried although the Government has constantly pressed for early trial. It is now set for trial on February 14, 1949. The transfer has required trips to Chicago by members of the Antitrust Division's

If judgment is for the plaintiff, it has no means of redress for the injury caused by the transfer. If judgment is for the defendant and if the plaintiff, on appeal, should urge that the judgment should be set aside because of error in transferring the cause the plaintiff would be inviting a cure worse than the disease. To win on such ground would mean that the cause would be retried *ab initio* in the district in which suit had started, in lieu of a possible reversal and prompt entry of judgment granting the relief to which the plaintiff was entitled. Moreover, even this doubtful remedy might not be open to the plaintiff. Since error in the venue is a defense which may be waived (*Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168), prosecution of the action in the district of transfer might be held to constitute a waiver of such defense.

If the Government's motion is well founded, the order of transfer frustrates the policy which Congress established when it passed the Clayton Act in 1914, and which Congress has adhered to ever since, namely, that in a suit under the antitrust laws against a corporation the plaintiff is entitled

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Los Angeles staff, resulting in absences from Los Angeles as follows: the Government's chief trial counsel, 48 days; a second staff member, 14 days; a third staff member, 13 days. When trial takes place these three members will have to be away from Los Angeles for at least two months—six to eight weeks of actual trial, with a minimum of two additional weeks required for pre-trial preparation, post-trial proceedings, and travel.

to have his case tried in the district of his selection if such district is among those specified by the statute. The grounds upon which this Court issued the writ of certiorari in *United States Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, 204, are therefore directly applicable: "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy * * *, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment."

The question presented for decision here is clearly of substantial public importance. The issue as to the extent of the authority conferred upon district courts by Section 1404(a) of Title 28, United States Code, affects the conduct of every civil suit under the antitrust laws against a corporation brought in a federal district court. The issue, until settled by this Court, will constantly plague both litigants and district courts.[8] In contrast with the *Alkali Export Assn.* case, where the question of statutory construction arose for the first time 27 years after enactment of the applicable statute, the issue in the present case was raised and decided within less than two months after the effec-

[8] The similar question of the application of Section 1404(a) to suits under the Federal Employers' Liability Act has already resulted in decisions in at least nine cases. See Government's petition for certiorari, p. 12.

tive date of the new statute.[9] Moreover, even in those cases in which district courts rule adversely to requested transfers, interjection of the issue of the convenience of the forum tends to frustrate "Congress' declared policy of expediting this type of litigation." *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 589-591.

The Government does not favor impairment of the policy against piece-meal appellate review. Its position is that to grant the review here sought will not operate to impair this policy. The question of the statutory authority of district courts, to which the requested review is confined, is necessarily involved in every antitrust proceeding governed by the venue provisions of Section 12 of the Clayton Act and allowance of review will forever set this question at rest. The question therefore differs sharply in character and in public importance from that which would be presented if a special writ were sought to review a ruling granting or denying transfer of an action where the alleged error was, not absence of authority to order transfer, but improper exercise of such authority.

*United States* v. *Rice*, 327 U. S. 742, upon which respondent National City Lines, Inc., has relied (Brief in opposition, pp. 5-6), is irrelevant in the present connection because the Court grounded its

[9] The Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d Sess., which enacted Title 28, United States Code, provides in Section 38 that the provisions of the Act shall take effect on September 1, 1948.

ruling against issuance of mandamus upon the conclusion that the governing federal legislation evidenced Congressional intent that rulings ordering remand of a case which had been removed from a state to a federal court should not be subject to appellate review in any form, prior to entry of final judgment. It is established that Congress had not similarly intended to foreclose all judicial review of interlocutory rulings in proceedings under the antitrust laws. *United States Alkali Export Assn., Inc.* v. *United States, supra; DeBeers Consolidated Mines, Ltd.* v. *United States, supra.*

## II

**Section 1404(a) of Title 28, United States Code, Does Not Apply to Suits under the Antitrust Laws and Does Not Amend Section 12 of the Clayton Act by Taking Away the Right, Given by that Section, to Trial in the Venue of the Plaintiff's Choice**

A Justice of this Court has written that statutes are to be interpreted in the light of the fact that they "are, as it were, organisms which exist in their environment."[10] A part of the environment clearly pertinent to the present problem is the legislation enacted by Congress dealing with the venue and trial of suits under the antitrust laws. "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion."[11]

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[10] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia Law Review 527, 541.

[11] *Id.*, p. 539.

When Congress passed the Sherman Act in 1890, it provided in Section 7 that suit for triple the damages caused by any violation of the Act might be brought in any federal district court in any district in which the defendant "resides or is found."[12] Section 4 of the Act (15 U. S. C. 4) conferred upon federal district courts jurisdiction of suits by the United States to prevent and restrain violations of the Act and, by virtue of Section 5 of the Act (15 U. S. C. 5), such suit might be brought, where there were two or more defendants, in the district of the residence of any one of them. This resulted because Section 5 authorized any court before which a proceeding under Section 4 was pending to summon before it any non-resident defendant. The court, in exercising the power thus conferred, was not free to consider whether the ends of justice would be more completely served by prosecution of the suit in some other district; the statute "left the complainant free to commence its suit in any Circuit Court [later district court] in which it could find and serve a resident conspirator." *United States v. Standard Oil Co.*, 152 Fed. 290, 296 (E. D. Mo.), affirmed on this point, 221 U. S. 1, 46.

Uniform practice under this statute had established that the plaintiff's choice of venue, if within the statutory limits, was conclusive and that a de-

[12] This section was superseded by Section 4 of the Clayton Act (15 U. S. C. A. 15 and historical note).

fendant could not defeat the plaintiff's choice on the ground of the inconvenience to the defendant of the venue selected. *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 580.

When Congress, by the Clayton Act, undertook to supplement and to render more effective the antitrust policy embodied in the Sherman Act, it broadened the venue provisions applicable to suits under the antitrust laws by providing in Section 12 that any suit thereunder against a corporation may be brought not only, as theretofore, in the district in which the defendant resides or is found, but also in any district wherein it "transacts business." The purpose of this change was to serve the convenience of the plaintiff, so far as bringing suit and conducting trial were concerned, and the grant of venue conferred not merely the right to institute suit in any authorized district but also the right to trial in such district (*National City Lines* opinion, 334 U. S. at 581-588). Such has been the uniform practice under the statute (*id.*, p. 580). Important policy considerations likewise support this view as to its effect (*id.*, pp. 589-592).

When the United States Code was published as an official restatement of the general and permanent laws of the United States (45 Stat. pt. 1), substantially all the statutory provisions governing the venue of suits in federal courts were included in Title 28, which was entitled "Judicial Code and

Judiciary."[13] The compilers of the Code apparently recognized, however, that Sections 4 and 12 of the Clayton Act were among the interlaced provisions for enforcement of the antitrust laws and they included these venue sections, not in Title 28, but in Title 15, Chapter 1, entitled "Monopolies and Combinations in Restraint of Trade" (15 U. S. C. 15, 22).

The question which the petition for certiorari here presents is whether Section 1404(a), Title 28, United States Code, as enacted by Public Law 773, 80th Cong., 2d Sess., amended Section 12 of the Clayton Act by taking away the right which it gave, that a plaintiff who brings suit in any district coming within the specifications of Section 12 may have his action tried in the district in which he brought suit. If Section 1404(a) does take away this right, it thereby partially repealed Section 12. There is such *pro tanto* repeal although Section 12 does not in *haec verba* confer right to trial in the chosen venue; rights which have been held to be conferred by a statute are as much a part of it as rights which the statute grants in specific terms.[14] Moreover, there is such repeal notwithstanding the fact that Section 1404(a), if applicable to suits brought under the venue provisions of Section 12 of the Clayton Act, would not repeal that section *in toto*

[13] See 28 U. S. C. 41 (25), 43, 101-114, 116; 28 U. S. C., 1940 Ed., 119, 121, 143, 163, 172, 177, 181, 728, and 762.

[14] See *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C. A. D. C.), certiorari denied, 335 U. S. 843.

but would merely repeal the right of greatest substance which it confers.[15] To construe Section 1404(a) as a *pro tanto* repeal of authority conferred by Section 12 "would require a clear expression of that purpose by Congress". *United States Alkalai Export Assn., Inc., v. United States*, 325 U. S. 196, 206.

In determining whether Section 1404(a) effected such repeal, it is appropriate and necessary to look to the nature, scope, and legislative history of the statute of which it is a part.

Public Law 773 is entitled "An Act to revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary.'". The major purposes of the Act, as expressed in the Committee reports, were to make the provisions of this title the law rather than merely presumptive evidence of the law, to arrange these provisions in a logical order, to remove existing inconsistencies and ambiguities in them, and to eliminate those which had been impliedly repealed or had become obsolete.[16] Since the venue provisions of the Clayton Act had not been incorporated in Title 28 prior to its codification by Public Law 773 (*supra*, p. 18) and since Public Law 773

[15] Place of trial is clearly of far greater importance than place of bringing suit. A right to bring suit in a particular district is a rather empty one if it may be defeated by exercise of discretionary authority, essentially non-reviewable (*supra*, pp. 11-12), to decide whether the district of suit is a convenient forum for trial.

[16] S. Rep. 1559, 80th Cong., 2d Sess., pp. 1-2.

did not bring them within that title, we begin with at least a strong implication that the new statute left these provisions untouched and unaffected.

Public Law 773 is legislation of a highly technical character and its drafting was delegated to a staff of editors of two law publishing firms.[17] In carrying out the task entrusted to them, to rearrange, to simplify, to clarify, and to eliminate the obsolete, the draftsmen of the bill inevitably proposed and drafted some changes in existing law, both in the nomenclature of federal courts and in certain other particulars. But respect must be given to the repeated assurances of the draftsmen, their advisers, the Congressional sponsors of the bill, and the Committee reports, that these changes were confined to minor and wholly non-controversial improvements in existing law.

The report on the bill by the Senate Judiciary Committee states (S. Rep. 1559, 80th Cong., 2d Sess., p. 2):

> Many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval.

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[17] H. Rep. 308, 80th Cong., 1st Sess., pp. 2-3.

The report of the House Judiciary Committee briefly describes, under the heading "Examples of Changes in Law", changes which the bill would effect (H. Rep. 308, 80th Cong., 1st Sess., pp. 5-7). Concerning the proposed Chapter 87 of Title 28, entitled "District Courts; Venue," the report states (p. 6):

> So also, minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under sections 1391-1406.

Various other statements by those chiefly responsible for the codification, that they had scrupulously avoided making any controversial change in the law, are set forth below.[18]

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[18] Congressman Keogh, Chairman of the House Committee on Revision of the Laws (the functions of which were, by the Congressional Reorganization Act, vested in Subcommittee No. 1 of the House Judiciary Committee), stated as to the revision of Titles 18 and 28 of the Code undertaken by his Committee (Hearings before Subcommittee No. 1 of House Judiciary Committee on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., p. 6):

> The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing companies as well as the employees of the committee, was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law.

Congressman Keogh further stated (*id.*, p. 11):

> We have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion.

When the bill came before Congress for action, it was treated on a basis consistent only with the premise that it represented, except for minor, noncontroversial changes, a codification of existing law. The bill was presented to both the Senate and the House via the consent calendar, rules were suspended, and aside from certain provisions relating to the United States Tax Court which were eliminated before passage, the bill passed practically without debate.[18] In the Senate, some 70 Committee amendments were adopted *en bloc*.

In the course of consideration of the bill on the floor of the House and Senate, no reference whatsoever was made to Section 1404(a). Nor was there any reference to Section 12 of the Clayton Act in the Committee reports on the bill, in the House hearings on the bill, or in the reviser's notes.

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Circuit Judge Maris, chairman of the Judicial Committee authorized by the Judicial Conference to serve in an advisory capacity, testified (*id.*, p. 19):

> Existing inconsistencies and ambiguities have been removed and obsolete and archaic provisions eliminated or modernized. At the same time care has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval.

The chief reviser selected by the publishing firms to supervise the work of their staffs in codifying titles 18 and 28 testified (*id.*, p. 24):

> The Advisory Committee, the Committee of the Judicial Conference on the Revision of the United States Code, the revision staff and all persons concerned in this work, have exercised extreme care to avoid any changes of substantive law, concerning which there might be any controversy.

[18] 93 Cong. Rec. 8550-8559; 94 Cong. Rec. 8108-8111, 8675-8678.

This is the more striking in that the bill was passed by the Senate on June 12, 1948, and by the House on June 16, 1948, only a few days after this Court had on June 7, 1948, rendered its decision in the *National City Lines* case expressly holding, as had always been the established practice, that the *forum non conveniens* doctrine is not applicable to suits under the antitrust laws. If Congress had intended to repudiate an established principle of antitrust law, so recently affirmed by this Court, it is almost inconceivable that it would have done so without adverting in some way, in the statute or in the legislature history, to either the principle or this Court's decision affirming it.

Section 1404(a) provides that district courts may, for the convenience of parties and witnesses, transfer "any civil action" to any other district where it might have been brought. The quoted words are general in their application but the field within which they have general application is the field as to which Congress was legislating. In this instance that field was the codification of Title 28.

Prior to Public Law 773, Congress had passed no legislation which authorized or regulated the judicially evolved rule commonly labeled *forum non conveniens*. At the time that Section 1404(a) took the form in which it was finally enacted, in the bill reported by the House Judiciary Committee on April 25, 1947 (H. Rep. 308, 80th Cong., 1st Sess.), there was serious doubt as to whether this doctrine

could be invoked in any suit which arose under a special venue statute. The dissent in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, in which three justices joined, observed (p. 62) that nothing in the language or history of the venue provisions of the Federal Employers Liability Act "differentiates it from the numerous other venue provisions of the Judicial Code," and raised the question whether the holding in the *Kepner* case did not lead to the conclusion that "every such venue provision" operated to eliminate application of the doctrine of *forum non conveniens*. Nor was such doubt dispelled by *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, decided March 10, 1947. The indicated ground of the Court's ruling (pp. 505-506) was that while there was room for application of the doctrine in cases arising under general venue statutes, it was not applicable to cases under special venue statutes. Cf. the concurring opinion in *United States v. National City Lines, Inc.*, 334 U. S. 573 at 597-598.

While there may be some question as to which of the venue provisions codified in Chapter 87 of revised Title 28 are drawn from special venue statutes, at least some of these provisions clearly are of this nature (see sections 1394-1403). Section 1404(a) therefore served two purposes. First, it established that the doctrine of *forum non conveniens* was applicable to any civil action arising under any of the venue provisions which were codified in revised Title 28. Second, it substituted

authority to transfer for the more drastic and inefficient remedy which alone might be employed under the judicially fashioned rule, namely, outright dismissal of the proceeding.

This Court has said that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination' ". *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479. The Court has also said that frequently even when the plain meaning of the words of a statute "did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words". *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, excepting as a different purpose is plainly shown.' " *Id.*, p. 544.

"Repeals by implications are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied." *United States* v. *Jackson*, 302 U. S. 628, 631. "It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling," even though the statute with the general

language is later in time. *Baltimore National Bank* v. *State Tax Comm.*, 297 U. S. 209, 215. And this Court, in an earlier case, set forth the rule as being that "where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatability, that the special is intended to remain in force as an exception to the general." *Washington* v. *Miller*, 235 U. S. 422, 428.

The legislative history of Section 1404(a), as distinguished from the legislative history of Public Law 773 generally, supports with the view that the section applies only to the venue provisions which were codified and that the section, at the very least, did not repeal rights as to place of trial given by venue provisions not included in Title 28, for the purpose of aiding in enforcement of the antitrust laws.

The testimony of the sole witness who dealt specifically with its venue provisions when hearings were held in the House, fully accords with the above view. This witness was Professor James William Moore of Yale University Law School, whom the draftsmen of the revised Judicial Code had retained as a special consultant. He stated that existing venue provisions had not been altered by the revision, but that two "changes of importance" had been made. One such change was that provided by Section 1406, that a case filed in the

wrong division or district should be transferred to a proper venue. The other, he said, was that Section 1404(a) "introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district." (Hearings by Subcommittee No. 1 of House Judiciary Committee on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., p. 29).

There was attached as an Appendix to the House report on the bill notes to each of its sections made by the chief reviser employed by the two law publishing houses engaged in drafting the bill (H. Rep. 308, 80th Cong., 1st Sess., pp. 1, 7, A1-A605). The notes on Section 1404(a) are confined to three sentences (*id.*, p. A132). The first sentence states the obvious, that the section "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." The third states the grounds upon which transfer of an action may be ordered, the convenience of parties and witnesses. The middle sentence reads: "As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio."

Since the *Kepner* case had engendered doubts as to the situations in which the doctrine of *forum*

*non conveniens* is applicable (*supra*, pp. 23-24), there was reason for referring to the case as illustrating the need for legislation dealing with the doctrine. But the reviser did not state that Section 1404(a) would overturn the right as to place of trial given by the special venue provisions of the Federal Employers' Liability Act. Even if it should be concluded that this, nevertheless, is what the reviser may have had in mind, he certainly did not declare his meaning with the explicitness which alone would warrant ascribing to Congress adoption of this meaning. An unmistakable expression of meaning would be required; we submit, to support a construction which would be in plain conflict with the repeated assurances by the sponsors of the bill that it made no change in the law of a substantial or controversial nature.

But even if the meaning of the reviser's note were not so obscure, it can hardly be accepted as authoritative evidence of the legislative "intent." In view of all the circumstances surrounding enactment of Public Law 773, particularly (a) the length and technical nature of its provisions, (b) the speed with which it was passed by both Houses, (c) the absence of any debate or reference to this problem, and (d) the repeated assurances given by the sponsors of the legislation that it was unnecessary for the members of Congress to study even the detailed provisions of the bill (not to mention the other legislative materials) because

such changes in law as they made were "minor," "technical," and "noncontroversial," the Government respectfully submits that it would make a mockery of the process of statutory construction by reference to the legislative history for this Court to hold that the reviser's note on Section 1404(a) must be accepted as positive evidence of what Congress "intended."

Finally, we submit that if the reviser's note should be regarded as sufficient to override, with respect to the Federal Employers' Liability Act, all countervailing considerations, and to repeal an absolute right as to place of trial given by that Act, such effect of Section 1404(a) should not be extended to suits under the antitrust laws. For the reviser undoubtedly did not have the antitrust laws in mind, as appears both from the text of his note and from the fact that up to that time no one had even suggested that *forum non conveniens* applied to antitrust cases. The Federal Employers' Liability Act and the antitrust laws are statutes totally different in subject, character and purpose. An intent to change the effect of the venue provisions of the former is not to be taken as evidencing a like intent as to the latter.

## CONCLUSION

For the reasons stated, it is respectfully submitted that leave to file the petition for certiorari should be granted, that the writ should issue, and that the order of transfer entered by the district court should be set aside.

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